

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 5, 2007

**OVERLAND RESTAURANT MANAGEMENT, LLC, d/b/a HUDDLE
HOUSE OF SHELBYVILLE v. THE COMMISSIONER OF LABOR AND
WORKFORCE DEVELOPMENT OF TENNESSEE**

**Appeal from the Chancery Court for Bedford County
No. 26,133 J. B. Cox, Chancellor**

No. M2006-02065-COA-R3-CV - Filed July 18, 2007

The Commissioner of Labor appeals the Chancery Court's reversal of a decision by the Board of Review for the Department of Labor concerning an individual's eligibility for unemployment benefits. The employer of a waitress who sought unemployment benefits, challenged the employee's claim contending she was not eligible to receive unemployment because she was terminated for violation of company policy. The Board of Review found her eligible for benefits. The Chancery Court reversed that decision. Having determined that the findings of fact by the Board of Review were supported by substantial and material evidence, we reverse.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Reversed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Lauren S. Lamberth, Assistant Attorney General; and Angela S. Bonovich, for the State.

W. Andrew Bobo, Shelbyville, Tennessee, for the appellee, Overland Restaurant Management, LLC, d/b/a Huddle House of Shelbyville.

OPINION

Christina Hall was employed as a waitress at a Huddle House operated by Overland Restaurant Management, LLC, in Shelbyville, Tennessee. She received a wage from her employer, however, a substantial portion of her compensation was earned in tips from customers.

At the end of a shift in August of 2005, Ms. Hall removed between three and four dollars from the "tip bucket" located near the cashier. The other waitress that night, however, believed those tips were her tips, and without discussing the matter with Ms. Hall reported Ms. Hall to the wife of

the owner, Mr. Holmes. Mr. Holmes reviewed a video surveillance tape that showed Ms. Hall removing money from the bucket, and he fired her the next day.

On October 3, 2005, Ms. Hall filed a claim for unemployment benefits. On October 12, 2005, the Agency found that Ms. Hall was disqualified from unemployment benefits because she was discharged from her most recent employment for violation of company policy concerning theft of tips. Ms. Hall timely appealed the denial of benefits to the Appeals Tribunal. On October 28, 2005, the Agency notified Ms. Hall and Huddle House that the Appeals Tribunal would conduct a hearing by telephone, and if either of them preferred an in-person hearing, they should contact the Appeals Tribunal immediately. Neither party contacted the Appeals Tribunal. Accordingly, an oral appeals hearing was conducted via telephone on November 7, 2005.

The Appeals Tribunal reversed the Agency's decision finding that the employer had the burden of proving that misconduct actually occurred, and the employer failed to meet that burden. Following the adverse decision by the Appeals Tribunal, Huddle House filed a timely appeal with the Board of Review.

On November 22, 2005, the Agency mailed to Huddle House an Acknowledgment of Appeal wherein the Agency asked Huddle House if it wanted a second evidentiary hearing in order to present additional evidence. As the Acknowledgment of Appeal provided, Huddle House was notified that if it desired a second evidentiary hearing, it was required to: (1) describe the additional evidence to be presented; (2) describe the facts the additional evidence will prove; (3) state why the additional evidence was not presented at the initial hearing, and (4) return the request within seven days.

In a letter dated December 2, 2005, Huddle House requested the second hearing to present additional in-person testimony of Mr. Holmes and other Huddle House employees that worked with Ms. Hall, along with the videotape of Ms. Hall removing cash from the tip bucket. Huddle House, however, failed to state why the evidence was not presented at the initial telephone hearing. The Agency never responded to the request for a second evidentiary hearing, and Huddle House failed to follow up on the request.

On December 13, 2005, the Board of Review affirmed the decision of the Appeals Tribunal affirming the decision that Ms. Hall was eligible to receive unemployment benefits. On January 20, 2006, Huddle House filed its Petition for Judicial Review. In an Order dated August 24, 2006, the Chancery Court reversed the decision of the Board of Review. This appeal followed.

STANDARD OF REVIEW

In an appeal from an agency decision concerning unemployment compensation, both the trial court and this Court are obligated to apply the same standard. *Ford v. Traughber*, 813 S.W.2d 141, 144 (Tenn. Ct. App. 1991); *Armstrong v. Neel*, 725 S.W.2d 953 (Tenn. Ct. App. 1986). That standard is set forth in Tenn. Code Ann. § 50-7-304(i)(2)-(3). The standard provides that the court may affirm the decision of the board or may reverse, remand or modify the decision if the rights of

the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (A) In violation of constitutional or statutory provisions;
- (B) In excess of the statutory authority of the agency;
- (C) Made upon unlawful procedure;
- (D) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (E) Unsupported by evidence that is both substantial and material in the light of the entire record.

Tenn. Code Ann. § 50-7-304(i)(2).

The statute directs that the court shall not substitute its “judgment for that of the board of review as to the weight of the evidence on questions of fact.” Tenn. Code Ann. § 50-7-304(i)(3). The statute further provides that no decision of the board shall be reversed, remanded or modified by the court, unless for errors that affect the merits of the final decision of the board. *Id.*

In reviewing the decision of the Board of Review, the court need not have found that the Board's decision was the only reasonable one or that it was the decision that the court would have reached had the issue been presented to it for the first time in the judicial proceedings. *Cawthron v. Scott*, 400 S.W.2d 240, 242 (Tenn. 1966). To the contrary, the function of the reviewing court is limited. *Id.* All that is needed to support the decision of the Board is a finding that it was warranted by the record and had a reasonable basis in the law. *Cawthron*, 400 S.W.2d at 242 (citing *Milne Chair Company v. Hake*, 190 Tenn. 395, 230 S.W.2d 393 (1950); *Moore v. Commissioner of Employment Security*, 197 Tenn. 444, 273 S.W.2d 703 (1954); *Aluminum Company of America v. Walker*, 207 Tenn. 417, 340 S.W.2d 898 (1960)).

ANALYSIS

This was not a factually intense case, and the record reveals that little evidence was presented to the Board of Review. It was undisputed that Ms. Hall took no more than four dollars out of the tip bucket that was underneath the counter, near the cashier. It was also undisputed that the waitress working with her believed Ms. Hall was stealing her tips and that the owner of the Huddle House fired Ms. Hall for taking the money out of the tip bucket. Ms. Hall, however, stated she believed it was her money – her tips – she took from the tip bucket, and that she did nothing wrong by doing so.

The Board of Review, which adopted the findings of fact from the Appeals Tribunal, made the following findings:

Claimant’s most recent employment prior to filing this claim was as a waitress for Huddle House until September 8, 2005. The claimant was discharged for taking tips

from a bucket that allegedly did not belong to her. Another waitress informed the owner's spouse that the claimant had taken the tips. The owner also witnessed the claimant on video taking the tips. The claimant thought the tips which totaled about three or four dollars, belonged to her. Each waitress either kept tips in her pockets or in a bucket. The claimant kept tips in her pockets and assumed the waitress with whom she was working did the same. On occasion, a waitress might clear a table for another waitress. Or a customer might be served by one waitress but pay another. The claimant had previously worked with another waitress who placed tips in the bucket for the claimant and vice versa. The employer did not have a policy regarding use of the bucket or where and how tips should be stored and monitored.¹

Based on these findings of fact, the Board of Review determined that the employer, Huddle House, failed to meet its burden of proving that Ms. Hall committed "a willful or controllable breach of [her] duties, responsibilities, or behavior which the employer has a right to expect." Upon this finding, the Board concluded that Ms. Hall was not discharged for conduct connected to her work pursuant to Tenn. Code Ann. § 50-7-303(a)(2) and thus was eligible for unemployment benefits.

The Chancellor determined that these findings were not supported by substantial and material evidence. This decision, however, was based on what the Chancellor characterized as the lack of testimony from Ms. Hall, which we believe constituted an erroneous shift of the burden of proof to Ms. Hall to establish she had not violated a duty to her employer. This is because the burden of proving a disqualification is on the employer. *Cherry v. Suburban Mfg. Co.*, 745 S.W.2d 273, 275 (Tenn. 1988). "In order to establish a disqualification there must be shown a material breach of some duty which the employee owes to the employer." *Cherry*, 745 S.W.2d at 275 (citing *Weaver v. Wallace*, 565 S.W.2d 867, 870 (Tenn.1978)).

Mr. Holmes admitted that he did not have a specific policy governing the usage of the bucket and Ms. Hall testified that she believed the money she took was properly hers. These facts alone are sufficient to withstand the substantial and material evidence standard of review.

For an additional issue, the employer, Huddle House, contends its due process rights were violated because it requested but was deprived of a second evidentiary hearing. We have concluded they were not.

First, Huddle House had the opportunity to request an in-person hearing as opposed to the telephone hearing, and it did not make such a request. Second, with respect to the letter requesting an additional hearing in which to present additional evidence, the request did not comply with the procedures set forth by the Board as Huddle House failed to state why the evidence was not presented at the initial hearing. Third, if the request had complied with the procedures, the decision of whether to permit the additional hearing was within the discretion of the Board of Review, *see*

¹References to "claimant" are to Ms. Hall.

Tenn. Code Ann. § 50-7-304(e), and Huddle House has failed to show that the exclusion of the evidence was anything more than harmless error.

IN CONCLUSION

The judgment of the trial court is reversed, and this matter is remanded with instructions to reinstate the decision of the Board of Review. Costs of appeal are assessed against Overland Restaurant Management, LLC, doing business as Huddle House of Shelbyville, for which execution may issue.

FRANK G. CLEMENT, JR., JUDGE